

BRUNEI REPORTS**PUBLIC PROSECUTOR v. ZAINAL ABIDIN
BIN ISMAIL & 3 ORS.**

[O.Cr.J. (Roberts C.J.) January 31, 1987]

[Bandar Seri Begawan – Criminal Trial No. 36 of 1986]

Penal Code, ss. 375, 376 & 511 – Rape – Attempted rape – Sexual intercourse taking place – Consent – Corroboration – Credibility of complainant – Criminal Procedure Code, s.117.

Evidence – Rape – Attempted rape – Consent – Corroboration – Danger of conviction without – Credibility of complainant – Accuracy of her story.

The first three defendants (D1, D2 and D3) were charged with raping a 20 year-old girl, Miss X, an offence punishable under section 376 of the Penal Code. The 4th defendant (D4) was charged with attempting to rape her. The girl was the principal prosecution witness. The gist of her evidence is that during the early hours of September 26, 1985, she was taken in a car by the four defendants to Meragang Beach, Muara. These defendants had identified themselves as members of the Religious Department C.I.D. When the car arrived at the Beach, D1 pulled her out of the car, holding both her hands, and took her to a sandy place, where he pushed her to the ground, held her crossed arms against her chest with one hand and pulled down her trousers and pants with his other hand. He removed his own trousers and pushed his penis into her. She said she was forced to submit. Then D3 raped her in the same way as D1. When D3 had finished D2 came and raped her, followed by D4 who also raped her. She said she did not tell her family what had happened when she first got back, because she was afraid of her father. She made a report at the Bera-kas Police Station at about 10 p.m. on September 26, 1985, where it was alleged in the report that Miss X was raped by three of the four men. She made a further report at Muara Police Station stating that she was raped by three of the four men.

When Miss X was examined by Dr. Lamplugh, a specialist gynaecologist, at about 10.30 p.m. on September 27, 1985, Miss X had changed her clothes and had washed her private parts since the time she alleged that she had been raped. The doctor found no bruises on the girl and no recent laceration of the hymen. She found no spermatozoa and no positive evidence of recent intercourse or injury. The only significance of the fact that the vagina admitted two fingers was that intercourse could have taken place at some time. Swabs from Miss X showed no motile spermatozoa or gonococci. One specimen was submitted to an acid phosphatase test, which showed a level of 140 i.u.

Statements made by each of the four defendants were admitted in evidence (see Court's ruling in Appendix). D1's statement was wholly exculpatory. D2 admitted in his statement that he had sexual intercourse with the girl. D3 in his statement said he had sexual intercourse with Miss X once. D4 in his statement said while he was having sexual intercourse with her he did not have an erection.

A In his defence, D1 said he got on top of Miss X but did not penetrate her at any time. In his defence, D2 saw D3 having intercourse with her. D2 got on top of her and penetrated. D3 in his defence said he penetrated her for two or three minutes and ejaculated outside her private parts. He thought she was willing to have intercourse because she did not struggle. In his defence, D4 said he did not see her crying or struggling when any of the other defendants was on top of her, nor was she crying when he approached her or when he got on top of her. D4 was, however, unable to get an erection and did not take off his trousers. The principal issues for decision are (1) did she consent to what was done to her by the defendants and (2) her credibility.

C Held: (1) the court could find nothing which amounted, in law, to corroboration of the evidence of Miss X in relation to the issue of consent. The court was left in relation to that with nothing but her testimony;

D (2) on some important features of the incidents which she described, such as how many people raped her and how many people penetrated her, her stories have varied. The learned judge could not be sure of the accuracy of her stories;

(3) it would be unsafe to convict the defendants on the charges. Accordingly, they were found not guilty and discharged.

E Cases referred to:

- (1) *R. v. Kilbourne* [1973] A.C. 729.
(2) *Haughton v. Smith* (1974) 58 Cr. App. R. 198.
(3) *Director of Public Prosecutions v. Morgan* [1976] A.C. 182.
(4) *Lee Look v. Public Prosecutor* [1985] 1 M.L.J. 240.
(5) *Cheong See Leong v. Public Prosecutor* [1949] M.L.J. 67; [1948-49] M.L.J. Supp. 56.
(6) *Public Prosecutor v. Emran bin Haji Md. Noor & Ors.* [1987] 1 M.L.J. v.
(7) *Public Prosecutor v. Ng Goh Weng & Ors.* [1979] 1 M.L.J. 127.
(8) *Walter v. Bank of Nova Scotia* [1964] 1 Ont. L.R. 673, 682.
(9) *Chorlton v. Lings* (1868) L.R. 4 C.P. 374.

CRIMINAL TRIAL.

Dk. Zabaidah bte. Pengiran Kamaludin (Deputy Public Prosecutor) for Public Prosecutor.

H *Raymond Szetu* for the defendants.

Cur. Adv. Vult.

Roberts C.J.: Preliminary. The first three defendants faced the following charge:

I "That you at about 0200 hours on the 26th day of September, 1985, at Pantai Meragang, Muara, Negara Brunei Darussalam, did commit rape on Miss X and that you have thereby committed an offence under section 376 of the Penal Code and punishable under the same."

The fourth defendant is charged as follows:

"That you, at about 0200 hours on the 26th day of September, 1985, at Pantai Meragang, Muara, Negara Brunei Darussalam, did attempt to rape Miss X and that you have thereby committed an offence under section 376 of the Penal Code read with section 511 of the same."

General

I remind myself, at the outset, that the burden lies on the prosecution to establish the guilt of each of the defendants beyond reasonable doubt, so that I am satisfied so as to be sure of their guilt; and that such burden never shifts.

By section 375 of the Penal Code, a man is said to commit rape if he has sexual intercourse with a woman under circumstances falling within any of the five descriptions set out in the section. This includes intercourse —

- (a) against her will;
- (b) without her consent; or
- (c) with her consent, when her consent is being obtained by putting her in fear of death or hurt.

The prosecution case is that the first three defendants had sexual intercourse with Miss X in such circumstances as to amount in law to rape. The fourth defendant is charged with attempting to rape Miss X.

Evidence of Miss X

As is usually the case in a trial of this nature, the principal prosecution witness is the complainant, Miss X, who was aged 20, at the time of the alleged offence. She gave her evidence with reasonable clarity and did not seem to be unduly disturbed by difficult or embarrassing questions.

There were a number of serious differences, either of fact or of emphasis, between the evidence which she gave before the Magistrate in March 1986, when the events of the previous September were relatively fresh in her mind and the testimony which she gave in January, 1987, almost 16 months after the events which she described.

In assessing her credibility, I take these discrepancies into account, though I do not regard it as necessary to examine each of them in detail. I shall later have to consider to what extent the discrepancies are due to the fading of an honest recollection, or to imagination or to inaccurate recall.

In her evidence, she described how, on the

A evening of September 25, 1985, she was fetched from the satay stall at Tiong Hin Supermarket, where she worked, at about 9.30 p.m., by a relative of hers, apparently a second cousin, named Saruzi bin Hj. Musli. He often collected her from work and took her home, but on this occasion he took her in his car to Serasa Beach, where they arrived about 10 o'clock. He asked her to help him to write a letter to his girlfriend, with whom he said he had fallen out. Miss X carried on a desultory conversation with him, while writing a letter at his dictation, until about 1 a.m. on the morning of September 26, when Saruzi decided to take her home. As they were about to leave, a white car drove up to them and blocked the exit from the beach. Three people emerged from the white car and approached Saruzi's car. They identified themselves as members of the Religious Department C.I.D. One of them said that they wanted to see their identity cards and another that they wanted to make sure that she and Saruzi were married.

One of them pulled Saruzi out of his car taking the keys of his vehicle. She was pulled out of the passenger's seat by two of the men and taken to the white car, the driver of which told Saruzi to go home.

She was taken away in the white car, in which were the four men and herself. She identified these four men who took her away as the four defendants, at an identification parade, the propriety and fairness of which were not challenged, at about 1700 hours on September 28. It is, in any event, not disputed by any of the defendants that they were present at Serasa beach and that they took Miss X in their car to Meragang Beach.

G After they drove away, Miss X asserted that one of them held a sharp object, which he pointed at the right side of her neck, though she did not suggest that this action was accompanied by any verbal threats or pressure. When the car arrived near Meragang Beach, D1, who was driving, drove off the road to the beach and stopped. Miss X said he got out of the car and relieved himself, while she remained inside it. He (D1) then returned and pulled her out of the car, holding both her hands, and took her to a sandy place, where he pushed her to the ground, held her crossed arms against her chest with one hand and pull down her trousers and pants with his other hand. He removed his own trousers and pushed his penis into her.

I She said that, because he was holding her forcefully with his other hand, she was unable to

struggle. She reiterated that he put his penis into her and that she was forced to submit.

While he was on top of her, he was still wearing his shirt but she did not remember about his trousers.

When this was over, D1 called for one of his friends, whom she identified as D3. He also held her hands but she was not certain if he was wearing a shirt or not. He raped her in the same way as the driver. After he was finished, her thighs were wet as they had been after D1 had raped her.

When D3 had finished, he called to D2 who came and raped her. Again she tried to free herself but failed. Then D4 came and raped her. She was not sure if his sperm entered her or not, but her thighs were wet again.

She added that she first thought that she was going to be raped when they arrived at the second beach, although none of the men had said what they were going to do to her. She said that she cried when she thought that they were going to rape her, although she did not scream or say anything. She did not think the men could have thought that she was willing. She was afraid that she might be killed. She was very frightened of the four men, though she could not say why.

She did not tell her family what had happened when she first got back, because she was afraid of her father, who was a very fierce man. She thought he would kill her if she told him about the incident.

After she had been raped in the manner which she has described, she was taken back to the car and driven to Jalan Lambak, where the car stopped so that the driver could buy cigarettes and soft drinks. The shop there was closed but he drove on to Jalan Gadong where he was successful. It was now about 3 a.m.

After the defendants had bought their cigarettes and drinks, the car took her to a place near her home, after she had told the driver where to go. As they neared her home, the driver told her that, if she revealed the matter to the police, the men would be looking for her. She left the car and walked towards her home. Before she reached it, Kassim, Jalani and Saruzi, who were in a car, stopped and pulled her into it. The car was being driven by her cousin, Jalani. They chased the defendant's car, KC 5244; when they caught up with

A it, Kassim shouted to D2, who was driving, to stop but he drove away. She was taken back to Jalani's house. She did not immediately go home, because she was afraid her parents would scold her for being out all night, but did so about 9.00 a.m. She stayed in her room speaking to nobody, because she was afraid and upset, until the late afternoon when she went to help at the satay stall. She was fetched from the stall by Saruzi's father, who asked her where she was the previous night. She gave no answer.

C After she had returned home, however, her brother, Jaludin, asked her where she had been the previous night and she admitted that she was "being disturbed," by which she meant she had been raped. As soon as she admitted this to her brother, the latter reported the matter to her father, who later took her to the Berakas Police Station with her brother at about 10.00 p.m. on September 26.

E When she arrived there, she made a report to Senior Inspector Kamaluddin, the O.C.S. Berakas Police Station. He gave evidence that her report was in the following terms and that it was so recorded in the Report Book —

F "The daughter (i.e. Miss X) lodged a report to me to the effect that on the 26.9.85 at about 1.45 in the morning, she was at Serasa Beach with her cousin. While there, a car came and four men came down and approached them. The men then introduced themselves as C.I.D. men from Pejabat Agama. They forced the complainant to follow them in their car. They took the girl to Meragang Beach, Muara and the complainant was raped by three of the men."

G Not long afterwards, Miss X was taken from the Berakas Police Station to a hospital, where she was examined by Dr. Lamplugh. Swabs were taken from her which were later examined by the Forensic Pathologist, Dr. Mathew.

H Later that day, she went to Muara Police Station to which the investigation of her complaint had been transferred and made the following further report, which was recorded in the station report book —

I "On 26.9.85, at about 2200 hours, I with my relation named Saruzi bin Hj. Musli, went to Muara in a car, BC 3589. On arrival at Serasa Beach, we had a conversation inside the car. It was about 1.45 hours, a white car, registration number KC 5244, approached us and four men alighted and approached us, introducing themselves as C.I.D. Religious Department. I was forced to follow them to go home. But they brought me to Meragang. On arriving there, I was threatened with a knife for the purpose of rape. I was raped by three of them. That is why I make this report."

The family witnesses

Saruzi, who accompanied Miss X to Serasa Beach later on the evening of September 25, supports in most material particulars the story which she told as to what happened, when the four defendants arrived at Serasa Beach in their car.

Because he was face to face with three of them at a distance of about two feet and could see their faces clearly, he was able to identify them as D1, D2 and D3. He noticed the number of the defendants' car as KC 5244.

The three defendants, who approached his car, announced that they were members of the Religious Department, C.I.D. and pulled him out of it, taking his key and demanding his name and that of Miss X. At that stage, D4, whom he identified, told him that he was not entitled to take the girl home, as she was related to one of them.

D2 told him to leave the place or he would assault him. He was pushed into his car and the door was closed. He got out and went towards their car, but was stopped by one of the defendants who said: "You want us to be tough or gentle with you?" He returned to his car, was handed the key and drove away to the house of Kassim, a cousin, who went with him and Jalani, Kassim's brother, to make a report at Berakas Police Station.

The police evidence was that such a report was made at about 3 a.m. on the 26th. According to Corporal 1223, Hassan bin Ibrahim, Saruzi came to the Police Station with two other men and told him that Miss X had been taken away by four men who introduced themselves as C.I.D. Religious Department. He recorded this in his day/night book and passed the report to Muara Police Station about half an hour later.

He drove back with Kassim and Jalani to the former's house, after searching for Miss X at Muara, Serasa and Meragang Beach and finding no trace of the girl. As they were nearly home, they saw her being dropped by a car in front of her house. She was crying and Saruzi asked her what the four had done to her. She replied that they should leave her alone and let her commit suicide. She then slapped Saruzi's face.

He corroborates Miss X's story of the chase of the defendants' car. After this, Miss X was taken to Kassim's house, where she said that the men had told her not to expose the secret or her family

A and she would suffer. Later they took her to her house where she went to her room, while Saruzi had a conversation with her relatives.

B Jaludin bin Mohd Zaini, an elder brother of Miss X, said he heard his sister crying in the early evening of September 26, and that he went into her room and asked her whether she was ill. At first she said nothing and then, when he told her that if something had happened to her, "we would not be angry," she told him that she had been disturbed. He went to inform their father, C Sgt. Zaini. The latter confirms that Jaludin did tell him that Miss X had been disturbed by four men and that he took her, later in the evening, to the Police Station at Berakas, at about 2230 hours, to make a report.

D Thus it can be said that the evidence, given by Saruzi, supports the story of the earlier stages of this incident as told by the complainant. Saruzi's evidence, in turn, is corroborated to a significant extent by that given by the members of Miss X's family.

E Medical Evidence

F Dr. Lamplugh, a Specialist Gynaecologist, examined the girl at about 0130 hours on September 27. She discovered, from questions put to the girl, that she had changed her clothes and had washed her private parts since the time when she alleged that she had been raped. She found no bruises on the girl and no recent laceration of the hymen. She found no spermatozoa and no positive evidence of recent intercourse or injury. The only significance of the fact that the vagina admitted G two fingers was that intercourse could have taken place at some time.

H Dr. Lamplugh took various swabs from Miss X and sent them for examination to Dr. Thomas Mathew, a Specialist Pathologist, who found no motile spermatozoa or gonococci.

One specimen, however, was submitted to an acid phosphatase test, which showed a level of 140 i.u.

I According to Dr. Mathew, if a woman washes herself after sexual intercourse and is examined about 24 hours later, in the majority of cases, there would not be spermatozoa or gonococci present, since the washing of the private parts would destroy all significant microbiological organisms like the gonococcus.

The level of 140 i.u. would not be expected, if she washed herself, particularly after 24 hours unless she had had recent sexual intercourse. This level indicated that seminal fluid must have been deposited in her vagina fairly recently. The medical evidence thus supports the complainant's testimony to the extent that it confirms that she had sexual intercourse at about the time of the alleged assaults upon her.

Statements

After a *voir dire*, I admitted in evidence statements made, after the prescribed statutory warning, by each of the four defendants.

The statement of D1 described his activities between 3.15 p.m. on September 25 and the early hours on September 26.

He stated that, during that evening, he was drinking at the BIC Club with the other three defendants and that at about 11.30 p.m., he went with them to the Worldwide Club in Berakas Camp, where they drank beer and played darts. At about 2.10 a.m. on September 26, the four of them went back to the BIC Club to fetch his car, KC 5244. He was then taken home to his car by Armi (D2), who borrowed it to return to his house. After that, he did not know what had happened.

This statement, therefore, was wholly exculpatory and makes no reference to the girl at all.

D2 gave a much more detailed statement, admitting that the four defendants drove in KC 5244 to Serasa Beach, where they saw another car with a man and a girl. They took the girl with them to Meragang Beach. There, he admitted that he saw D1 lay the girl down on the beach. After D1 stood up, D3 "took his turn." After D3 stood up, he (D2) "took his turn." He added, "I saw that the girl was without panty and so I had sexual intercourse with her and the girl only said to me, 'help sir' (pa'cik)."

This is an admission by D2 that he had sexual intercourse with the girl. He says nothing as to whether or not she consented to it.

D3, in his statement, admitted that he was in KC 5244 when it was driven to Serasa Beach and that three of the defendants, including himself, approached the other car and claimed to be members of the Religious Department C.I.D.

A After that, the girl got into their car and they drove to Meragang Beach. Here D1 took the girl out and had sexual intercourse with her. After "I took my turn and had sexual intercourse with the girl once and after me, Armi (D2) took his turn and I saw Armi having sexual intercourse with that girl."

B He added, "After the four of us raped the girl, I wanted to have intercourse with the girl once again but I did not because my friends stopped me."

C This, therefore, if the use of the word "raped" is accepted in its normal sense, is an admission by D3 that he had intercourse with the girl against her will.

D D4, in his statement, also admits going to Serasa Beach in D1's car and confirms that the other defendants posed as C.I.D. from the Religious Department. He said that the girl got into their car and that they drove to Meragang Beach. Here D1 and the girl got out of the car and he saw him having sexual intercourse with her.

E After that, D3 and D2 both had sexual intercourse with her, in turn.

F D4 continued, "I then took my turn," adding, "While I was having sexual intercourse with her, I was not hard (erect)."

G This statement could be interpreted as suggesting that, although he meant to have sexual intercourse with her, he was not in fact able to do so, because his penis was not erect. He does not mention whether the girl was willing or not.

The defence

H The 1st defendant, in evidence, told a story which expanded to a substantial degree that which appears in his statement to the police.

I His evidence coincided with his statement, to the point which he and his friends left the Worldwide Club in Berakas, after an evening in which there had been substantial drinking. In his statement, he said he knew nothing of what happened thereafter.

In his evidence, however, he admitted that he drove his car to the end of Serasa Beach, where he saw a man, whom he later found to be Saruzi, and Miss X sitting in a car. He agreed that D2 told

them that "we were religious police," and that the driver begged him to give back the ignition key of his car which he had removed and that he refused to do so. The girl, according to him, approached him, telling Saruzi that he could go back and that she wanted to go with the men. She entered the car and sat next to him.

As he drove the car by a somewhat round-about route to Meragang Beach, the girl asked him if it was necessary to take her to the religious department and suggested they could discuss the matter. He then admitted that he was not from the Religious Department. When she asked him why he had said that, he replied that he did so because they could be a witness against her for being too close to another man.

D1 first said that he meant to take Miss X home when she entered his car. He changed his story and said that he meant to take her to the religious department, but changed his mind, when she said she would like to discuss it, because he "took pity on her."

At Meragang Beach, he stopped the car and took the girl to a log, about 30 feet away. There they sat and had a conversation, during the course of which he questioned her about what she and Saruzi had been doing together at Serasa Beach.

After this, he asked her to spend the night with him. When she refused to do so, he said he would like to have a romance with her. He got up and they walked, holding hands, for a short distance, after which they sat down and he began kissing and embracing the girl. He took off his trousers and told her it would be unfair for her not to take off hers. She removed her trousers and pants up to her knees. He got on top of her and rubbed his organ between her thighs. He did not penetrate her at any time. He ejaculated and asked her if she was angry and she replied, "No."

He went away to clean the sperm off himself. As he was doing so, D3 came and said would he like a chance too and D1 told him, "No, don't put your organ into her, don't spoil my chances with her later." D3 said, "Okay" and D1 went into the bushes to clean himself.

When he came back, he saw D4 standing with the girl. D3 said he wanted to have intercourse with the girl. He told him not to and pulled him and the girl to the car. They drove back to Gadong,

A where drinks were purchased and afterwards took her home.

D1's story differs significantly from that of the other defendants, in that the latter allege, in effect, that they assumed Miss X was willing to have intercourse with them because they saw her have it with D1.

D1, however, asserts that he had a conversation with her, that she made no protest when he started making love to her and that she partly removed her clothing willingly; and that he told D3 not to spoil his chances.

Armi bin Haji Serbini, D2, is a man of 30. His evidence, very sensibly, since there was, by the time he gave his evidence, little dispute as to what occurred before the car arrived at Meragang Beach, concentrated on what happened there.

He saw D1 and Miss X sit on a log at about 30 feet from the car for about half an hour, after which they walked hand in hand on the beach.

E He saw D3 on top of the girl, having intercourse with her. He went over to the girl and talked to her. He could not remember what he said but he wanted to find out if she was willing to have intercourse with him. She remained silent so he got on top of her and penetrated. While he was inside, she said, "Please help me pull it out." He did so and ejaculated outside.

When asked why he said, in his written statement, that the girl only said, "Help sir," he replied that the Inspector may have left it out though he told him the same.

She said nothing to him before he got on top of her. He did not know why she was willing, though he had never met the girl before. He was sure that she was willing. At the end of his evidence, he admitted that he did not ask her, which was a change of story.

Again, the only issue is consent. Did Miss X agree to have intercourse with D2, as he asserts, or was it against her will as she describes.

I Ak. Aji bin Pg. Md. Tahir (D3), aged 34, described now he met the other defendants at the B.I.C. club, where they stayed until 11.00 p.m. on September 25. Thereafter, they went to the World-wide Club where they took more drinks before driving to Serasa Beach.

He confirmed D1's evidence that three of them got out of their car and approached another car, near the beach, and that he told the driver that he was C.I.D. from the religious department, with which the others agreed.

The driver was told by D1 to go home and the girl, who had been in the car, who was Miss X, was taken by them to another beach. During the drive there, he was sleepy and took no part in any conversation. He did not see anyone point a sharp object at Miss X's neck.

At the second beach, he saw D1 take the girl to a log and sit with her there. After 10-15 minutes, they walked away, holding hands, to a place about 60 feet from the car. He saw D1 on top of Miss X. On seeing this, he went over the girl who was still lying on the beach, with her pants round her knees.

He told D1 that he would like a chance, to which D1 replied that he should ask her himself nicely. He did not do so, but took off his trousers, removed hers and had intercourse with her. He denied that the girl was crying or that she struggled.

He gave two versions of what had happened in the car on the way to Meragang. First, that the girl said nothing during the journey. Second that D1 talked to her but that he did not know what they discussed.

He agreed that he said nothing to Miss X as she lay on the beach half naked. He did not speak to her or ask her if she was willing. He saw her there and just climbed on top.

Under cross-examination, he changed his ground and said that he did talk to her but he cannot remember what he said.

He penetrated the girl for two or three minutes and ejaculated outside her private parts. While he was cleaning himself, he saw D2 approaching the girl. When he got back to the car, he saw D4 doing the same.

He asserted that he thought that the girl was willing to have intercourse because she did not struggle. Shifting his ground again, at the end of her evidence, he alleged that he asked the girl if she was willing. When asked why he had not said this before, he made no reply.

A I note, in passing, that the offence of rape is committed if there is penetration of a woman without her consent. Whether or not there is ejaculation, and whether or not, if there is, this is inside or outside the victim is irrelevant.

B Ak. Emran bin Pg. Md. Noor, D4, is an unemployed man of 22. He agreed that he was one of the men who accompanied Miss X to Meragang Beach early in the morning of September 26.

C He saw D1 and Miss X get out of the car and sit on a log, about 30 feet from the car, for 20 minutes, after which they walked towards the beach.

D He saw D1 on top of the girl for several minutes, leaving her on the ground. He observed D3 on top of the girl, followed by D2. After that, he went to the girl because he was "in the mood to have sexual intercourse with her."

E He did not see the girl crying or struggling when any of the other defendants was on top of her, nor was she crying when he approached her or when he got on top of her.

He said that he believed that the girl allowed him to have intercourse with her "because she likes it."

F He was, however, unable to obtain an erection, although he intended to have intercourse with the girl when he got on top of her. So the girl asked him to go back, which he did. He did not take his trousers off, because he had no erection.

G He claimed that, before he got on top of the girl, she spoke to him, but he could not remember what she said. He changed his story and admitted that the girl said nothing, so he got on top of her.

H When asked what he meant by the passage in his statement to the police which said, "While I was having sexual intercourse with her, I was not hard," he replied that he did not say those words.

Legal Issues

I I remind myself of a number of propositions of law, which are applicable to the issues in this trial.

- (a) That in a charge of rape or attempted rape, corroboration of the evidence of the complainant is required, and that I must direct myself as required by *R. v. Kilbourne*.⁽¹⁾

- (b) That having so directed myself that it is dangerous to act on the evidence of the complainant alone, I may, nevertheless, act on her evidence alone if I find it so credible that I am sure of guilt and am prepared to act upon it.
- (c) A confession made to a police officer by a defendant is evidence only against the defendant who made the statement and not against a co-defendant. However, evidence given during the trial by any defendant is evidence against any other defendant.
- (d) Complaints made by a complainant in a sexual case do not amount to corroboration of her evidence, but may establish the consistency of her conduct.
- (e) That the evidence on each charge and that against each defendant must be considered separately.
- (f) That, in relation to D4, charged with attempted rape, the act relied on as constituting the offence must be more than an act preparatory to the offence, but must be proximate to and not merely remotely connected with the offence — see *Haughton v. Smith*.⁽²⁾ There can be an attempt where the failure to convict the offence is due to “ineptitude, inefficiency or insufficient means on the part of the defendant.”

Applying this test, I find that, notwithstanding that he failed to penetrate the girl by reason of his inability to obtain any erection, D4 did attempt to penetrate the girl, and that the acts which he took preparatory to the offence, namely by lying on top of the girl, with his expressed intention of having intercourse are sufficient in law to constitute an attempt of rape (leaving aside the question of consent).

Consent

At the close of the case for the defence, the issues were greatly narrowed.

It was no longer in dispute, and I find that it was established beyond reasonable doubt, that Miss X had sexual intercourse on that beach with D2 and D3. It was no longer in dispute that D1 had made love to the girl; on his evidence, this did not amount to intercourse, though on the girl's evidence, it did.

A It was no longer disputed by D4 that he had lain on top of the girl with the intention of penetrating her, though he had been unable to do so.

B In relation to them, therefore, I have to consider only whether the prosecution has satisfied me, so that I am sure, that these acts of intercourse took place in such circumstances as to constitute rape under section 376 of the Penal Code — i.e. did Miss X consent to what was done to her.

C It is, I think, appropriate at this point that I should refer to the *Director of Public Prosecutions v. Morgan*⁽³⁾ which sets out the principles which have to be applied by a judge when deciding the issue of consent on a charge of rape. The majority view of the House of Lords, which was subsequently overruled by the Sexual Offences Act, 1967, which does not apply in Brunei, was that the crime of rape consisted in having sexual intercourse with a woman, with intent to do so, without her consent or with indifference to whether or not she consented. The offence could not be committed if that essential intention was absent. Accordingly, if an accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape.

Credibility of Miss X

F I must next assess the credibility of Miss X on this issue of consent, as to which there is no corroboration, though there is supporting evidence that she did have sexual intercourse, at about the time she was taken to Meragang.

G I have already mentioned briefly that there are a number of differences between the various descriptions which she gave of what had happened on that night.

H When she was first taken to the police station on the evening of September 26, she stated that she was “raped by three of the men.” The following morning, she made a further report at Muara Police Station, in which she said: “On arriving there, I was threatened with a knife for the purpose of rape. I was raped by three of them.”

I On September 28, at 10.20, she made a long statement, Exhibit 35. This was recorded in Malay but a translation of it into English was not available until late in the trial, after all the evidence had been completed.

In consequence, although reference had been made to it during Miss X's evidence, defence counsel had not been able to question her about its contents, as he would certainly wished to do, since it differs in important respects from her evidence.

When she gave evidence in the Magistrate's Court, she claimed that the first three defendants had penetrated her and that the fourth defendant had tried and failed. In her evidence at the trial, she was insistent that all four had penetrated her. The question of penetration is central to the case. I have to ask myself whether, if her recollection of such a vital matter has varied to such an extent, I can safely rely on her evidence as a whole.

There is, I think, a grave danger that, as time has gone by, the girl's memory of what happened on the beach that evening has become distorted and, to some extent, inaccurate. It is understandable that, in her first two statements, she might have used the word "raped" when she meant no more than "interfered with."

But her detailed written statement, in which she describes what each of the men did to her, amounts to no more than an allegation of a series of attempted rapes. Since then, she has convinced herself that she was penetrated and raped by all of them, even, in her last evidence, by D4.

I must also consider the extent to which the manner in which she behaved, after the defendants had taken her home, is consistent with a girl who has been raped, or with that of a girl who has consented to sexual intercourse and is ashamed of herself.

I recognise that, in trying circumstances of this kind, women do not react to a consistent or common pattern. Nevertheless, the courts have developed an approach which places some importance on the manner in which a girl behaves after an incident of this kind. This is based on an assumption that a girl who has been sexually assaulted is more likely than not to want to complain about it to a member of a family or to a close friend.

Miss X explained that she was restrained from making an earlier report to members of her family by her fear of her father, whom she said was a fierce man, who had punished her severely on a previous occasion for misbehaviour. And she may well have been inhibited by her realization that her presence on Serasa Beach with Saruzi was a religious offence and certainly likely to be the subject

A of sharp criticism from members of her family. Nevertheless, she said nothing about what had occurred until, after substantial pressure from members of her family and from Saruzi's father, she admitted that she had been disturbed, about 17 hours after the incidents. It is arguable that a woman who was raped would have been expected to report it as soon as she returned home; whereas a woman who had consented would be less likely to do so.

C I do not leave out of account the unlikelihood that a woman would give her willing consent to sexual intercourse or indecent behaviour by four men, whom she had never met before. I accept that when she left Serasa Beach, in the company of the defendants, she did not do so willingly but because she believed them to be religious police.

D Having examined the other evidence in the case, I can find nothing which amounts, in law, to corroboration of the evidence of the complainant, in relation to the issue of consent. I am left in relation to that with nothing but her testimony.

E I remind myself, yet again, that it is dangerous to convict on the basis of such evidence alone, unless I am sure of the veracity and accuracy of the testimony given by the complainant.

F As I have indicated, on some important features of the incidents which she described, such as how many people raped her and how many people penetrated her, her stories have varied. This may be partly due to the passing of time and to the influence of imagination on memory. She may believe that what she now says is true but I cannot be sure that it is accurate.

H I am, therefore, driven to the conclusion that it would be unsafe for me to convict the defendants on the charges which they faced and must find them not guilty and discharge them. I would like to add that their conduct, on the evening in question, was disgraceful and that what they did on the evening in question, on the basis of their own evidence, though it does not amount to a criminal offence, was morally inexcusable.

Accused discharged.

APPENDIX

Roberts C.J. (giving his ruling on January 27, 1987): The prosecution sought to adduce in evidence —

- (a) an oral admission made by Emran (D4) to Senior Inspector Pengiran Rajid between 0340 and 0410 on September 27;
- (b) four written statements taken from the four defendants as follows:
 - (i) Zainal (D1) at 1350 on September 28;
 - (ii) Armi (D2) at 1310 on September 28;
 - (iii) Aji (D3) at 2300 on September 29;
 - (iv) Emran (D4) at 2100 on September 29;

According to S.I. Rajid, whose evidence I believed, he arrived at Muara Police Station at 0340 on September 27. He asked Corporal 1222 if D4, who was present, was the man.

When the Corporal pointed at D4, the S.I. began asking him questions about the report which Miss X had lodged at Berakas Police Station.

The interview lasted about 30 minutes. During the course of it, D4, according to the S.I., made a number of damaging admissions. At no stage during the interview did the S.I. administer a caution.

Since he was not feeling well at the time, he did not make any immediate record of what D4 had said, though at some time, though he could not remember when, later on 27th he made a note of the substance of D4's admissions to him.

He admitted that, before he took this statement, the O.C.S. Berakas had already informed him of the substance of the complaint lodged by the complainant.

D4 resisted the admission of this statement on the ground that it was obtained from him by violence (a punch by S.I. Rajid); and by threats by the S.I. that he would take him to the family of the complainant because they wanted to beat him up.

Insp. Rajid testified that he used no violence or threats against D4, at the time of the latter's verbal admissions or at any time thereafter. I accept his evidence as to this and am satisfied that the oral statement of D4 was not obtained by violence, inducement, threat or oppression.

However, it is also necessary for me to be satisfied of the accuracy of the record made by the S.I. of what D4 is supposed to have said to him.

A As I have mentioned, there was a period of some hours between the interview and the record made of it. The S.I. did not, as is the desirable practice, make his note as soon as possible and seek D4's agreement to its accuracy. And he recorded only a summary of the interview, which included damaging admissions, but nothing in D4's favour.

B I do not reject this oral admission because no caution was administered, since the new section 117 of the Criminal Procedure Code, enacted in 1984, by implication, removes the previous requirement that a caution ought to be administered as soon as a police officer is satisfied that a charge should be brought, replacing that requirement by a warning in the form set out in section 117(3) of the Criminal Procedure Code (C.P.C.)

C I do so because I am not persuaded of the accuracy of the note made by him, some hours later, especially as it does not purport to record the actual words used by D4, but is a summary of them in the third person.

D The defence sought to exclude the written statements on two main grounds –

(a) that the prosecution had not established that they were voluntary;

(b) that they were inadmissible in law, because they had been recorded by an officer who had been involved in the investigation of the offences.

So far as the first ground is concerned, S.I. Rajid gave evidence that, in each case, the statement was given voluntarily, without threat, promise or inducement. That it was preceded by a warning in the form prescribed by section 117(3) of the C.P.C. That it was read over by him to the defendant who agreed that it was correct and signed it.

No evidence was given by any of the defendants to the effect that the statements were other than voluntary, or that they were inaccurate.

I Counsel for the defence suggested to the S.I. that the defendants were tired when statements were taken from them. He disagreed and none of them gave any evidence to that effect.

The burden of establishing the voluntary nature of a statement beyond reasonable doubt lies on the

prosecution. I am satisfied that S.I. Rajid was telling the truth and that the prosecution has established that the statements of all four were voluntary.

This would be sufficient for them to be admitted in evidence, save for the argument in law advanced for the defence. This submission is based on two cases, *Lee Look v. Public Prosecutor*⁽⁴⁾ and *Cheong See Leong v. Public Prosecutor*.⁽⁵⁾

In *Lee Look*, a Malaysian High Court judge allowed an appeal from a Sessions Court on the ground that the cautioned statement made by the accused, which was the only evidence against him, had been recorded by the investigating officer. Consequently, he ruled, the President should have held the statement to be inadmissible in evidence "as it might result in a miscarriage of justice."

The judge in *Lee Look*, in reaching his conclusion, purported to follow *Cheong See Leong*, a decision of the Malayan Court of Appeal.

It appears, from the very short note contained in the M.L.J.,* that the defendant had made a statement to an Inspector of Police through a Sergeant, who had been a member of the police party which found the defendant in illegal possession of a firearm.

The Court of Appeal found –

- (a) that "the principle" that a judicial officer, who is interested in a case, should not sit to adjudicate upon it, applies to interpreters;
- (b) that the Sergeant, who was conversant with the facts, and later called as a prosecution witness, should not have been used as an interpreter to take the statement.

The reasoning is not easy to follow. It is difficult to see why the rules of detachment which apply to a judge or magistrate, who has to reach a decision, should apply to an interpreter, who is performing a wholly different function.

Nor do I see how a case which dealt with the propriety of the use of interpreters in a dual role can be said to be authority for an entirely different proposition, namely that if a police officer, who has taken part in an investigation, records a statement by a defendant, it must, *ipso facto*, be

A excluded, even if wholly voluntary, because, it is said, the police officer will be biased.

B Under the common law on the admissibility of confessions, which applies in Brunei, the test is whether or not the statement is voluntary, and, of course, whether it is accurate. I do not know of any reported case from England or Hong Kong, both of which administer the common law, which prohibits, in the manner suggested, the production in evidence of a statement taken by an investigating officer. I find that such a restriction is not supported by authority nor necessary in the interests of justice.

C It may be useful if I add a note as to some of the effects of the amended section 117 of the Criminal Procedure Code, as I interpret it –

- D (a) Provided that a statement is voluntary, as defined in subsection (2), it is admissible in criminal proceedings.
- (b) This applies equally to oral and written statements and to those which are inculpatory or exculpatory or a mixture of both.
- E (c) Before a statement is admissible, it is *not* necessary that a caution should have been administered. Indeed, a caution in the old form, warning a suspect that he is not obliged to say anything, is a discouragement to the making of a statement, and so contrary to the terms of the warning in subsection (3).
- F (d) If a person is charged, or officially informed that he may be prosecuted, he shall be served with a warning notice, in the form set out in subsection (3).
- G (e) Failure to serve such a notice at the appropriate time will not of itself exclude a statement which is voluntary, in view of subsection (1) which makes a statement made by a person, admissible, if it is voluntary, whether it was made "before or after that person is charged", though a failure to deliver the warning is likely to give rise to doubt as to the voluntary nature of a statement given in circumstances in which the warning should have been delivered.
- H (f) Subsection (3) limits, in one important respect, a defendant's so called "right of silence" by providing that, if he is given a warning notice under subsection (3), but not otherwise, the court may draw adverse inferences from
- I

* The full report appears at [1948-49] M.L.J. Supp. 56.

his failure to mention facts on which he intends to rely at his trial.

I therefore decided to admit the written statements of all four defendants. However, having so decided, my attention was drawn to a ruling of Garcia J., in *Public Prosecutor v. Emran bin Haji Md. Noor & Ors.*⁽⁶⁾

It was submitted to the judge that a confession made by a person who is in custody is admissible in evidence *only* if made in the presence of a magistrate, by virtue of section 26(1) of the Evidence Act (Cap. 108), which reads —

“Subject to any express provision contained in any written law, no confessions made by any person whilst he is in custody of a police officer, unless it is made in the immediate presence of a magistrate, shall be proved against that person.”

In *Public Prosecutor v. Ng Goh Weng & Ors.*⁽⁷⁾ the Federal Court of Malaysia decided that section 113 of the Malaysian Criminal Procedure Code (which is similar in effect to section 117 of the Brunei C.P.C.) “is such written law and is an exception expressly permitted by section 26 of the Evidence Act” (which is in similar terms to section 26 of Cap. 108) so that a statement would be admissible if it complied with section 113 of the Malaysian C.P.C.

The judge, in expressing his opinion that *Ng Goh Weng* was wrongly decided, seems to have placed some reliance on an Ontario case, *Walter v. Bank of Nova Scotia*.⁽⁸⁾ The report itself is not available, only an extract from the judgment of Schroeder J.A.

In commenting on a section of the Corporation Act, which was to apply unless “otherwise expressly provided in an Act or instrument,” he says —

“In my opinion, the word ‘expressly’ is used in section 287 in the sense — meaning that a provision in the Act or instrument creating the corporation does not have the effect sought to be attributed to it unless it is stated in express and positive terms, directly and not merely by implication from the language used.”

It is dangerous to rely on an extract from a report which is not available. However, what the extract appears to be saying is that, where an Act applies to any company, unless another Act or instrument creating a company expressly exempts the company from its application, the exemption must be in positive terms and may not be implied.

A Another view of the effect of similar phraseology can be found in *Chorlton v. Lings*.⁽⁹⁾ Sections 4 and 7 of Lord Brougham’s Act, 1850, use the term “unless the contrary be expressly provided and declared” by a particular Act.

B Wilkes J. commented at p. 387 —

C “It is not easy to conceive that the framer (of Lord Brougham’s Act) when he used the word “expressly” meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is clear that whatever the language used necessarily and naturally implies is expressed thereby.”

D The underlying principle of statutory interpretation is that the paramount criterion is the legislature’s intention. Did the law-making body, which is presumed to know the existing law, intend section 117 of the C.P.C. to be subject to section 26(1) of Cap. 108, or did it intend section 26(1) to be subject to section 117.

E The essence of section 26(1) is that no confession of any kind made to a police officer by a person in custody is to be admissible in evidence, unless made in the presence of a magistrate.

F The essence of section 117 is that *any* statement, whether or not it amounts to a confession made to a police officer, at any time, whether before or after he is charged, is admissible, if it is voluntary.

G Section 117 thus contains an express provision which prescribes a new procedure for the admission of statements. This procedure is wholly incompatible with section 26 of Cap. 108.

H A defendant facing serious charges is likely to be in custody before he is charged with the offence. But any voluntary statement which he makes after being charged will be admissible by virtue of the section.

I Section 117 does not refer to section 26; nor does it in terms purport to be an “express” provision within the meaning of section 26. But it is an express provision in the sense that it enacts a law which is in clear conflict with section 26 and which is unworkable unless it supersedes it.

There can, in my view, be no doubt that the legislature intended that the procedure prescribed by section 117 of the Criminal Procedure Code

should supersede section 26, that provided for by that it intended section 117 to be an express provision to the contrary within the meaning of section 26 and that it has achieved that intention.

I find myself able to reach this conclusion, because the opinion of Garcia J., who had already ruled the statements concerned to be inadmissible because they were not voluntary, was *obiter* and not necessary to his decision.

I therefore reject the argument that no confession which is made to a police officer by a person in custody is admissible unless made before a magistrate. If a confession to a police officer satisfies the requirements of section 117, it is admissible and section 26 should be regarded as nullified by section 117.

Solicitors: *Szetu & Co.*

WONG TING YONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Addison J.) December 4, 1985]

[Bandar Seri Begawan – Criminal Appeal No. 12 of 1985]

Passports – Possession of passports of others – Authority to retain passports not revoked by holders – Whether appellant held passports without lawful authority – Emergency (Passports) Order, 1983, s.12(1)(a), (f) & (g).

The discovery of 5 passports in the possession of the appellant led to his being charged as follows:

"That you, on the 26th day of June 1985, about 1855 hours, in the compound of the Bandar Seri Begawan Central Police Station, in the Negara Brunei Darussalam, without lawful authority, did have in your possession the following passports (A list attached) issued for the use of other persons than yourself, to wit, to those persons as in the list, and that you thereby committed an offence contrary to section 12(1)(g) of the Emergency (Passports) Order, 1983."

The holders of these 5 passports were 2 Filipino girls and 3 Thai girls. The Magistrate found that the appellant was in possession without lawful authority of the passports of the 2 Filipino girls, neither of whom had asked him for the return of her passport. The only issue in this appeal is whether the Magistrate was correct in deciding that the appellant was in possession of the passports without lawful authority.

Held, allowing the appeal: (1) the passports in this case were voluntarily handed over to the appellant. His authority to retain those documents was never revoked.

A He assumed the responsibilities as custodian of the documents for and on behalf of the passport holders. His initial acquisition of the passports was not unlawful. Merely continuing to hold them did not evidence any possession by him for an unlawful purpose;

(2) the conviction was quashed and the fine, if paid, must be returned to the appellant.

B

Cases referred to:

- (1) *R. v. Wuyts* [1969] 2 All E.R. 799.
- (2) *Wong Pooh Yin v. Public Prosecutor* [1954] M.L.J. 189; [1954] 3 All E.R. 31.
- (3) *Dickins v. Gill* [1896] 2 Q.B. 310.
- (4) *R. v. Jura* [1954] 1 Q.B. 503.
- (5) *Abdul Salam v. Public Prosecutor* [1955] M.L.J. 116.

C

CRIMINAL APPEAL.

David Clidero for the appellant.

James Chew (Deputy Public Prosecutor) for

D Public Prosecutor.

Cur. Adv. Vult.

Addison J.: On June 26, 1985, the appellant's motor vehicle was searched by the Police and in an envelope inside that vehicle were found five passports. This discovery led to his being charged with an offence contrary to section 12(1)(g) of the Emergency (Passports) Order, 1983.

E

Precisely, the charge was in these terms:

F

"That you, on the 26th day of June 1985, about 1855 hours, in the compound of the Bandar Seri Begawan Central Police Station, in the Negara Brunei Darussalam, without lawful authority, did have in your possession the following passports (A list attached) issued for the use of other persons than yourself, to wit, to those persons as in the list, and that you thereby committed an offence contrary to section 12(1)(g) of the Emergency (Passports) Order, 1983."

G

The holders of these 5 passports were two Filipino girls and three Thai girls.

H

The Magistrate found that the appellant was in possession without lawful authority of the passports of the two Filipino girls whose names were Miss Alicia A. Joven and Miss Gertrude O. Reyes. Their passports were in order but neither had a valid visitor's pass or a work permit.

I

The facts of the case showed that Miss Joven, a single woman aged 24, came to Brunei on October 28, 1984, to work as a maid for Mr. Lim Seng Kiat. She handed her passport to the appellant whom she knew to be "the representative of her employer." Her visitor's pass was last extended to Novem-